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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

ALBERT VELASCO, Debtor.	Case No. 99-51706 Chapter 13
ALBERT VELASCO, Plaintiff, vs. GMAC, Defendant.	Adversary No. 99-5131 <b>Memorandum Decision and Order</b>

This matter comes before the Court on Plaintiff’s motion for a preliminary injunction. The Court has reviewed the papers and pleadings and heard the arguments of counsel. For the reasons explained, the Court grants the Plaintiff’s motion and orders turnover of the car on the condition that the adequate protection provisions described below are satisfied.

**BACKGROUND**

Albert Velasco and his father, Guadalupe Velasco, are the registered owners of a 1994 Chevrolet Silverado pickup truck, which they purchased on or about January 16, 1994. After making a down payment, they financed the balance through General Motors Acceptance Corporation (“GMAC”). During the original 48 month financing term, their payments were late more than 31 days five times and more than 61 days twice. In addition, GMAC allowed them to suspend two monthly payments and to

1 extend the maturity date of the contract twice. When the 48 months had elapsed, GMAC refinanced the  
2 \$10,366.85 balloon payment as it was required to do under its Smart Buy Contract. The refinancing was  
3 accomplished only after numerous attempts by GMAC representatives to locate the truck, Albert Velasco  
4 and Guadalupe Velasco. The new three year loan term began on July 16, 1998.

5 From April 1998 until February 1999, Albert Velasco was his mother's primary caretaker and he  
6 lived with her in Mexico. The truck was with him in Mexico from October 1998 until his return to the  
7 United States. He did not make any payments on the three year loan during this time. Meanwhile,  
8 Guadalupe Velasco filed a voluntary petition under Chapter 7 of the Bankruptcy Code on October 5,  
9 1998. GMAC received relief from the stay as to the truck on November 13, 1998. When Albert Velasco  
10 returned to California with the truck in February, GMAC repossessed it.

11 GMAC sent Albert Velasco a notice of intent to dispose of vehicle on February 22, 1999. The  
12 notice advised him of his right to redeem and that he had lost his right to reinstate the contract because  
13 the truck had been taken out of state.

14 Albert Velasco filed his Chapter 13 petition on March 11, 1999.

### 15 **CONTENTIONS OF THE PARTIES**

16 On March 26, 1999, Albert Velasco filed the instant complaint to compel turnover of the car as  
17 estate property. He contends that GMAC's possession was wrongful after March 15, 1999, when he  
18 provided proof of insurance and demanded the truck's return. Albert Velasco is starting a new job and  
19 needs the truck to travel to work.

20 Albert Velasco timely made his first plan payment to the Trustee on April 12, 1999. He has  
21 secured full coverage insurance for the truck from Viking Insurance and listed GMAC as the lienholder.  
22 He is willing to stipulate to an adequate protection order which would include such items as keeping  
23 GMAC advised of the truck's location and maintaining full-coverage insurance. He proposes to treat  
24 GMAC's claim as fully secured in his plan, including storage charges and attorney fees.

25 GMAC has provided the Court with a vehicle condition report indicating that repairs to the truck  
26 will cost \$2,152.50. Additionally, according to a DMV report obtained by GMAC, Albert Velasco's  
27 driver's license has been suspended four times since October 1992, including once for driving without  
28 proper insurance. His driver's license is only valid if he is insured. GMAC contends that the only

1 acceptable form of adequate protection is for Albert Velasco to redeem the vehicle in full at once or allow  
2 GMAC to retain and sell it.

3 **DISCUSSION**

4 The question presented is whether, when a motor vehicle is seized prepetition but the debtor's  
5 right to redeem under state law has not yet expired and a sale has not yet been held, the vehicle becomes  
6 property of the bankruptcy estate at the time of filing. If it does, then continued retention by the secured  
7 creditor violates the automatic stay and the debtor is entitled to turnover of the vehicle. If not, the  
8 secured creditor may retain the vehicle without violating the stay unless the debtor redeems the vehicle  
9 in full. Albert Velasco has filed an adversary proceeding seeking turnover of the truck. The matter is  
10 therefore properly before the Court.

11 GMAC cites In re Fitch, 217 B.R. 286 (Bankr. S.D. Cal. 1998), for the proposition that because  
12 the car was seized prepetition, Albert Velasco lost his right to possession and has only the right to  
13 redeem. According to Fitch, the right to redeem is property of the estate, but the right to possess the car  
14 remains with the secured creditor and does not become property of the estate. Id. at 291 ("Since the  
15 Debtor did not have the unfettered right to possession at the time the petition was filed the unfettered  
16 right to possession did not become property of the estate."). Therefore, a secured creditor does "not  
17 violate the automatic stay by retaining the car pending adequate protection." Id. at 290.

18 Although Fitch was the first published California case to address this issue, it stands almost alone  
19 among bankruptcy courts in other states. "[T]he vast majority of courts have concurred that where  
20 repossession of a vehicle has occurred prepetition, but the vehicle has not yet been sold, a Chapter 13  
21 debtor retains a sufficient interest in the vehicle so that turnover may be appropriate." Spears v. Ford  
22 Motor Credit Co. (In re Spears), 223 B.R. 159, 163 (Bankr. N.D. Ill. 1998).<sup>1</sup> Spears and the cases it

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24 <sup>1</sup> The citations listed by the Spears court in support of this statement include:  
25 National City Bank v. Elliott (In re Elliott), 214 B.R. 148, 151 (6th Cir. BAP 1997); American Honda  
26 Finance Corp. v. Littleton (In re Littleton), 220 B.R. 710, 715 (Bankr.M.D.Ga.1998); Mattheiss v. Title  
27 Loan Express (In re Mattheiss), 214 B.R. 20, 32 (Bankr.N.D.Ala.1997); Turner v. DeKalb Bank (In re  
28 Turner), 209 B.R. 558, 562 (Bankr.N.D.Ala.1997); In re Sharon, 200 B.R. 181, 187 (Bankr.S.D.Ohio  
1996); In re Pluta, 200 B.R. 740, 744 (Bankr.D.Mass.1996); In re Young, 193 B.R. 620, 621  
(Bankr.D.D.C.1996); Karr v. General Motors Acceptance Corp. (In re Karr), 129 B.R. 498, 502  
(Bankr.S.D.Ohio 1991); Leverette v. NCNB South Carolina (In re Leverette), 118 B.R. 407, 409

1 cites rely heavily on a seminal Supreme Court case, U.S. v. Whiting Pools, 462 U.S. 198, 103 S. Ct.  
2 2309, 76 L. Ed. 2d 515 (1983).

3 Whiting Pools must be both the starting and ending point for a discussion of this issue, for its legal  
4 reasoning is directly on point. According to the Supreme Court, the Bankruptcy Code section dealing  
5 with property of the estate is to be broadly interpreted. 462 U.S. at 205. It is so broadly interpreted, in  
6 fact, that even property in which the debtor lacks a possessory interest may become property of the  
7 estate. Id. at 206. Therefore, secured creditors are afforded extra protections, “including the right to  
8 adequate protection, and these rights replace the protection afforded by possession.” Whiting Pools, 462  
9 U.S. at 207. Whiting Pools concluded that “the reorganization estate includes property of the debtor that  
10 has been seized by a creditor prior to the filing of a petition for reorganization.” Id. at 209.

11 This Court finds that Whiting Pools, although decided in the context of a Chapter 11  
12 reorganization, is directly on point. Property seized prepetition but not yet sold is still property of the  
13 estate and the right to possession of that property belongs to the estate. Because Whiting Pools is  
14 binding precedent, the Court respectfully disagrees with the Fitch court’s conclusion that when a debtor  
15 lacks the right to possession at filing, that “unfettered right” may not become property of the estate.

16 Since GMAC will lose the protection afforded by possession, it must receive adequate protection  
17 in another form. The following adequate protection must be provided to GMAC before the truck will  
18 be turned over to Albert Velasco and must be maintained on an ongoing basis as applicable:

- 19 1. Full insurance coverage must be paid three months in advance at all times. In the event GMAC  
20 requests proof of such prepayment and it is not made available within ten days, GMAC will be entitled  
21 to full and complete relief from the automatic stay and may repossess the vehicle.
- 22 2. Vehicle registration must be kept current. In the event GMAC requests proof of such registration  
23 and it is not made available within ten days, GMAC will be entitled to full and complete relief from the  
24 automatic stay and may repossess the vehicle.

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(Bankr.D.S.C.1990); In re Bingham, 116 B.R. 541, 543 (Bankr.N.D.Ohio 1990); Wallace v. G.M.A.C.  
28 (In re Wallace), 102 B.R. 114, 116 (Bankr.S.D.Ohio 1989).

1 3. Albert Velasco's plan must provide for GMAC's claim to be treated as fully secured in the amount  
2 of \$12,325.00 plus interest at 9.49%.

3 4. GMAC must receive at least \$195 per month under the plan, which payment shall increase to at  
4 least \$365.75 per month when Albert Velasco's attorney fees have been paid.

5 5. Albert Velasco must maintain timely payments under the Chapter 13 plan.

6 6. Albert Velasco must keep GMAC apprised of the location at which the vehicle is garaged at all  
7 times.

8 7. Albert Velasco may not remove the vehicle from the state of California.

9 8. The vehicle may only be driven by a properly licensed driver.

10 9. The vehicle may not be modified or driven in a manner tending to cause damage, e.g., racing, off-  
11 road use, reckless driving.

12 10. GMAC may inspect the vehicle at reasonable times on 3 days' notice.

13 11. In the event Albert Velasco fails to comply with the provisions of paragraphs 5, 6, 7, 8, 9 or 10,  
14 GMAC may send a ten day written notice of breach of condition to the debtor and his counsel, and  
15 GMAC shall be entitled to immediate relief from the automatic stay without further Court order on the  
16 11<sup>th</sup> day in the event Albert Velasco fails to cure the breach.

17 12. In the event Albert Velasco defaults on any of the provisions in paragraphs 5, 6, 7, 8, 9 or 10  
18 three times and GMAC has sent a notice of breach of condition to him and his counsel on all three  
19 occasions, on the fourth occasion of breach, GMAC shall be entitled to immediate relief from the  
20 automatic stay without further notice and without further Court order.

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The adequate protection terms described herein shall survive the confirmation of a plan of reorganization but shall terminate upon dismissal or conversion of this bankruptcy case or discharge of Albert Velasco.

Good cause appearing, IT IS HEREBY ORDERED.

DATED: \_\_\_\_\_

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UNITED STATES BANKRUPTCY JUDGE